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No. 665

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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This is a cross-petition for writ of certiorari in a case in which the United States has filed a petition on other grounds, No. 664, this Term.

OPINIONS BELOW

The opinion of the Indian Claims Commission of March 12, 1957, is reported at 5 Ind. Cls. Com. 96. Its opinion of July 18, 1957, is reported at 5 Ind. Cls. Com. 297. The opinion of the Court of Claims of July 16, 1958 (Pet. App. 1a-11a) is reported at 163 F. Supp. 663. Its opinion of October 8, 1958 (Pet. App. 11a-17a) is reported at 166 F. Supp. 939.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958 (Pet. App. 11a). A timely petition of the United States for rehearing was denied on October 8, 1958 (Pet. App. 17a). The time for filing a cross-petition was, by order of January 3, 1959, extended to February 5, 1959. The cross-petition was filed on January 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s.

QUESTION PRESENTED

Whether interest must be added to an award made under the Indian Claims Commission Act pursuant to a holding that the United States, as consideration for a cession of lands by an Indian Tribe in 1900, should have paid some $4,067,000 rather than the $2,000,000 it did pay.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides, in pertinent part, as follows:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant

would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *

STATEMENT

Prior to 1889, the Kiowa, Comanche and Apache Tribes owned lands in Oklahoma. The so-called Jerome Agreement was negotiated with them, which Congress eventually ratified by the Act of June 6, 1900, 31 Stat. 672, 676, providing generally for the cession of the Oklahoma lands to the United States, for the allotment of them in severalty, and for the payment to the tribes of $2,000,000 for surplus lands. Lone Wolf and other members of the Tribes sought to enjoin execution of the Agreement on the grounds, among others, that changes made by Congress had not been approved and the Agreement and action taken thereunder violated constitutional rights of the Indians. Judgment for the defendants was affirmed by this Court, *Lone Wolf v. Hitchcock*, 187 U.S. 553, on the ground that Congress had plenary authority to administer property of the

Indians and the courts were not authorized to oversee the manner in which that power was exercised.

The same claim was asserted before the Indian Claims Commission under the Indian Claims Commission Act. The petition to the Commission alleged that the claim "is one which would result if the Jerome Agreement were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake of fact, and is a claim based upon fair and honorable dealings as between a powerful guardian and a weak and helpless ward." The Commission sustained the claim on the ground that Indians had not agreed to the Agreement as enacted in the 1900 statute because of substantial changes made by Congress (App. 36-38).[1] The difference in consideration paid, as compared to the 1900 value of the lands ceded, was found to be $2,067,166 (App. 71). The Commission at first allowed some offsets against that award, but on rehearing denied them. In its opinion on rehearing, it also denied the Tribes' claim that interest since 1900 should be added to the award (App. 132-135). It reasoned that under *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49, interest cannot be allowed on unpaid claims against the United States unless statute or contract so provides, and that the only exception to that rule is when property is taken and the Fifth Amendment requires compensation for delay in payment. The *Lone Wolf* case, the Commission held, foreclosed the question whether the acquisition of the lands here was a taking under the Fifth Amendment. The Court of Claims affirmed the denial of interest on the ground that the

[1] References to "App." are to the Government's appendix as appellant in the Court of Claims, nine copies of which have been filed in No. 664.

petition of the Tribes did not state a claim arising under the Constitution (Pet. App. 10a).

ARGUMENT

1. Petitioners recognize that *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, must be overruled if they are to prevail. But they make no attack on the reasoning of that case nor do they give any justification for overturning a ruling which has stood as a guidepost in Indian law for some 55 years, and which this Court cited as authority this year in *Williams* v. *Lee*, No. 39, this Term, decided January 12, 1959, slip op., p. 7. There is a fundamental difference between the taking cases cited by petitioner (pp. 5-6) and cases where the Commission concludes that inadequate consideration has been paid. The difference is that liability in the latter instance arose, not from the Constitution, but solely because Congress, in the Indian Claims Commission Act, authorized re-examination of its prior transaction with the Indians. Since it did not provide for interest on any resulting award, none is payable. *United States* v. *Blackfeather*, 155 U.S. 180, claimed to be in conflict (Pet. 5), rested on the ground (155 U.S. at pp. 192-193) that "there was a contract expressly stipulating for the payment of interest."

2. As both the Commission and the Court of Claims have held, petitioners' claim on the merits was not asserted under the Constitution. The court rested liability on the basis of recovery of damages for breach of a contract implied in fact, or recovery on grounds of fair and honorable dealings (Pet. App. 7a); or on the ground that the contract has to be revised because of unconscionable consideration (Pet. App. 16a). Interest may not be added to awards made on any of those

bases. See *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

FEBRUARY, 1959

[2] There is, of course, no connection between the questions presented in the Government's petition in No. 664 and the question presented in this cross-petition.

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